No. 80358-7

SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON RULE OF LAW PROJECT, a voluntary associational endeavor of Stephen K. Eugster,

Appellant,

versus

ROB MCKENNA, Attorney General of the State of Washington; SAM REED, Secretary of State of the State of Washington; CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY, a Washington regional transit authority; REGIONAL TRANSPORTATION INVESTMENT DISTRICT PLANNING COMMITTEE, a Washington regional transportation investment district planning committee,

Respondents.

REPLY OF APPELLANT (AMENDED)

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I. THE SEPARATE BALLOT PROPOSITIONS CAN PROCEED TO A VOTE THIS FALL BUT WITH SOME CORRECTIONS FOR THE PURPOSE OF CONSTITUTIONAL COMPLIANCE

Given the traffic problems in the I-5 and I-405 corridors and the desire to expand Sound Transit's mass transportation system it is important the two ballot propositions in question go on the ballot at the 2007 general election.

They can advance but with some changes to ensure they comply with the Washington State Constitution Single Subject Requirement.[1] Each matter would go on the Fall 2007 ballot separate from the other. There would be no contingency that both must pass for one to pass.

The RTID ballot could not call for the construction of new roads, roads not now in existence in any form, for example, the Cross Base Highway Project.[2]

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[1] Wash. Const. Art. II, § 19.

[2] A new highway in Pierce County which would cut across Fort Lewis and McChord military bases to be known as SR 704.

To achieve this result the court (a) would declare SHB 1396 unconstitutional in violation of the Single Subject Rule, (b) declare the dual contingency requirements of RCW 36.120.070 and RCW 81.112.030(10) unconstitutional in violation of the Single Subject Rule, and (c) declare investments in new roads as part of the RTID are violations of the Single Subject Rule thus taking the Cross Base Highway Project out of the RTID proposal.

In addition, the court should rule on the constitutionality of Section 5 of SHB 1396 and thus ensure there will be no future attempts by the legislature to make legislation constitutional if legislation is not tested in short limitation of action periods.

II. FACTS

Prior to SHB 1396, Sound Transit was to put a proposition on the 2007general election ballot for the expansion of its system of mass transit and RTID was to put its

"investment plan" (really a list of road transportation projects) on the 2007 general election ballot. There two statutes calling for these separate ballots, RCW 36.120.070 and RCW 81.112.030(10).

The legislature, wanting both to pass but unsure whether the electorate would pass both, engaged in a bit of "logrolling" to better insure passage of each proposition. The legislature said a proposition could not pass unless the other passed – this was called a "contingency requirement."

It was plain this logrolling effort might not be successful. It was obscure, confusing.

The solution to the problem was SHB 1396. SHB 1396 put both of the propositions on the ballot under a single proposition. Thus a passage or defeat of both was forced because electors would be voting on both as one (except for those voters in the RTID district but outside of the Sound district).

A vote by an elector residing in both districts would be a

vote about both propositions – a positive vote on one would of necessity force a positive vote on the other. One could not vote yes on one and no on the other. A vote by a person living outside the overlapping areas of the districts, a voter in northeast Snohomish County, let us say, would only be a vote for the RTID proposal.

III. ARGUMENT

A. Single Subject Issue

Two separate and distinct propositions were to be put on the 2007 general election ballot prior to SHB 1396. Participating counties were to submit a regional transportation investment plan pursuant to RCW 36.120.070. Under RCW 81.112.030(10), at the 2007 general election Sound would present a proposition to support additional implementation phases of the authority's system and financing plan developed under RCW Ch. 81.112.

Neither of these had to happen. That is, prior to the

passage of SHB 1396 there were two possible propositions, one by Sound and the other by an RTID (if one was sought to be created by "two or more contiguous counties"). RCW 36.120.070.

These possible propositions were separate from each other, the votes were separate, and the districts were separate. But the district boundaries could overlap depending on the scope of the RTID.

SHB 1396 puts these separate propositions on the same 2007 general election ballot. But, the Act combined these two separate subjects. What the Act did, quite plainly, was to violate the Single Subject Rule. The legislation's purpose was to effect a false combination of separate subjects, false because they are separate and have been regarded as separate by the legislature.

Respondents contend this is permissible because the subjects fall under the broad heading of transportation.

Interesting, imagine this scenio. What if the Mariner's

baseball field, "Safeco Field", suffered a seismic event causing great damage midpoint in a season, a season where it looked as though the Mariners might have a good shot at winning the World Series. Let us say the damage could be repaired if $97 million were to be showered on the problem and the field repaired before the final set of games for the Series.

Then let us suppose a special session of the legislature is called to put a proposition on the ballot to fund the repairs.

Now let us say, some imaginative legislators interested in building a basketball arena in Renton or the Auburn - Kent area came up with a ballot proposition for a public facilities district to build the basketball arena and passed it into law to be voted on by the electorate.

Doubts come up as to whether the electorate will go for the basketball arena. But, something must be done because some think the dangers of the Sonics leaving the state are as great as the Mariners not being able to play its last games in a repaired Safeco Field.

Now let us say the legislature even gets more imaginative and comes up with a solution – it decides to both propositions on the same ballot as a single ballot proposition under the heading of "professional sports investment plan" at a special election called on an emergency basis. And, the governor obliges and signs the legislation as soon as it crosses her desk.

Respondents would say this legislation would comply with the Single Subjects Rule.

As one can see, the Single Subject Rule becomes meaningless under the Respondents' point of view.

B. Plenary Power of Legislature

Sound and RTID make an argument which can be called the "plenary power argument." The essence of the argument is that "the legislature has plenary power over municipal corporations." The term "plenary" means "full."

Yes, but what of such power? Having such power does

not mean that other constitutional provisions and limitations about how such power is exercised are trumped by the power. Sound and RTID even recognizes this – see its quotation from *Wheeler School Dist. No. 152 of Grant County v. Hawley*, 18 Wash.2d 37, 43, 137 P.2d 1010 (1943).

There is nothing in the constitution which says that "plenary power" is a power to get the better of the remainder of the constitution. *Southcenter Joint Venture v. National Democratic Policy Comm.*, 113 Wash.2d 413, 443, 780 P.2d 1282 (1989) (state's plenary power as sovereign is limited by the state's own constitution).

C. Standing

Respondents do not think WRLP (Eugster) should be considered as having taxpayer standing to bring this case. They argue that Eugster's taxes to the Sound project and the RTID projects will be small because Eugster lives in Spokane, a place in Eastern Washington. They say taxpayer standing is

dependent on payment of sales taxes to be imposed by Sound and RTID. They ignore the other taxes involved. Gasoline taxes, property taxes, other sales taxes which have gone into the projects over the years and which projects already extant are to be included in the proposals, especially the road projects. See the various Declarations of Stephen K. Eugster herein.

Respondents' contentions call for a new rule for taxpayer standing – "if you are a taxpayer regarding a project but do not live in the area of the project you do not have taxpayer standing." This rule is to be applied despite the fact the "out-of-project-area-taxpayer" may pay more in taxes toward the project than an "in-project-area-taxpayer."

This might be referred to as the "taxpayer from Spokane exception to Washington's common law of taxpayer standing."

Despite the facts of the case – that Eugster has and will pay projects taxes and other taxes -- Respondent thinks Eugster

does not pay *enough* taxes to have standing.[3] This is presumed because Eugster's residence is Spokane.

Eugster pays significant property taxes to the state of Washington, even though his real property and tangible personal property (subject to tax) is located in Spokane, Washington.

Eugster has paid gasoline taxes to the state of Washington and has owned automobiles in the state of Washington since he became a resident and elector of the state in 1967.

Eugster is in the Seattle - Tacoma - Everett area at least once a month and sometimes more than once a month. When he is there, he spends money, lots of it, and pays sales taxes on the purchases. He pays the sales taxes, the seller merely collects and pays over to the state the sales taxes paid.

The various projects to be enhanced, improved, and

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[3] There has been no suggestion as to when taxes paid are "enough" to establish standing under Respondents' views.

added to by the Sound proposal and the RTID proposal are assets already in place. Eugster has paid taxes over the years which have benefitted the Sound assets. The RTID projects are state highways that have been paid for with gasoline taxes and property taxes of gasoline tax and property taxpayers of and in the state of Washington. Eugster is one of them.

Eugster will continue to go to the Seattle - Tacoma - Everett area whenever one or both of the propositions in question passes.

Eugster, despite the fact he lives in Spokane, Washington is a Washington taxpayer with standing in this case.

Another interesting contention is there should be a Taxpayer from Spokane Taxpayer Standing Exception because a person from Spokane is a "transient" sales taxpayer. Some cases from other jurisdictions which are not fitting are cited by Respondents Sound and RTID.

The primary case for their theory is *Williams v. Lara*, 52

S.W.3d 171 (Tex., 2001). But, the case did not address the issue of a transient taxpayer. It dealt with whether in Texas, taxpayer standing would be accorded to a person who paid rent and who paid sales taxes. The taxes being paid were not tied to any sort of expenditure or tax collection taking place under legislation in question before the court. The case is simply not apposite.

Another reason why the case does not apply is that the *Williams* court based its decision on a sales tax law that is completely different from the sales tax laws of the state of Washington.

The court held that "sales taxes" are not a basis for taxpayer standing and in doing so cited a number of cases. But then the court said this: "In reaching this conclusion, these courts have determined, under their applicable state statutes, that a sales tax is imposed on the seller of goods, not on the purchaser." *Id.* at 180 (emphasis added).

In Washington the opposite is the case. The sales tax is

imposed upon the buyer, not the seller. The seller merely collects the tax paid by the buyer. For purposes of sales tax statutes, the "buyer" is the person who is legally obligated to pay the seller in any transaction. RCW 82.08.020 and RCW 82.08.050. *See, e.g., AARO Medical Supplies, Inc. v. State, Dept. of Revenue*, 132 Wash.App. 709, 716, 132 P.3d 1143 (2006).

Sound and RTID cite yet another case, *Jacob v. State,* 12 Neb.App. 696, 685 N.W.2d 88 (2004). This case relied on the same reasoning as *Williams v. Lara.* It said "[t]he Nebraska sales tax scheme appears to be similar to that of Texas. In *Williams v. Lara*, 52 S.W.3d 171 (Tex.2001), the Texas Supreme Court considered the question of whether the payment of sales tax was sufficient to confer taxpayer standing. 52 S.W.3d at 180. The court accordingly held, 'for prudential reasons,' that paying sales tax does not confer taxpayer standing on a party." *Id.*

Williams v. Lara and *Jacob v. State* do not support

Sound and RTID's assertion that a "transient taxpayer" (whatever that means, (the cases did not really use the term)) does not have taxpayer standing.

In any event, Eugster is hardly a "transient" taxpayer. He regularly pays state property taxes, gasoline taxes and sales taxes in the state of Washington and as to the latter especially, and regularly pays sales taxes in the Snohomish, King and Pierce County areas of Sound and RTID. See his declarations herein.

D. Voting Power

Eugster is a taxpayer. A taxpayer who is challenging the constitutionality of legislation of the state in which he is and has been a citizen since 1967.

As such, he has right to challenge legislation which calls for law of the state of Washington which constitutes a violation of the voting rights of citizens of the state. Eugster has clearly stated why the voting process of SHB 1396 is unconstitutional

under both state and federal constitutional law. Nothing more need be said.

In a combined election, an election addressing two separate propositions, an election in which the election districts do not overlap (there are voters in Snohomish County who reside outside the Sound district), an election whereby some voters have more voting power than other voters, and an election where votes in one district will have an impact regarding the outcome of legislation in another district one must conclude voting rights are being violated.

Approval of such a voting scheme surely violates constitutional principles.

E. Limitation on Constitutional Challenges

Section 5 of the Act says this: "Any legal challenges as to the constitutionality of this act must be filed in superior court along with any supporting legal and factual authority within twenty calendar days of the effective date of this

act."

This is a statute of limitation on any legal challenge to the constitutionality of the Act. This language is not advisory, it is not "procedural," it is mandatory.

The effect of the language is to validate the Act even if it is unconstitutional if no "legal challenge" to the Act's constitutionality is not commenced within the 20-day window.

If such special limitation of action concerning legal challenges to legislation is acceptable to the court, the legislature will from now on put such limits in every piece of legislation.

Imagine legislation which clearly violates a provision of the Washington State Constitution, let us say a provision which may be a Washington constitutional right but not a right protected under the due process clause of the 14th Amendment to the United States Constitution.

If a legal challenge is not made within the limited time period, *voilà*! ---- an unconstitutional law has just become constitutional. No messy court action, no troublesome need to amend the constitution. The simple passage of time and citizen "neglect"[4] has turned something constitutionally wrong into something right.

The attorneys for Sound, RTID and the State assert the issue of Section 5's constitutionality is moot or there is no case or controversy as because Eugster served and filed the case and noted it for hearing within the time periods called for in the Section.

This is a declaratory judgment action. Clearly, the parties have a controversy about the constitutionality of Section 5. Even if it were moot, the court should still decide the issue.

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[4] The legislature imposes a new standard for citizen involvement. The new standard is this – "if you have not got enough commitment to act to protect your rights in 20 days you do not deserve to have your rights protected."

Section 5 is not procedural. It is substantive. It is a statute of limitation which should be a part of RCW Ch. 4.16.[5]

IV. CONCLUSION

The propositions can go on the ballot for the 2007 general election but with some changes. These are set forth and explained in the first part of this reply.

Respectfully submitted this 19th day of August 2007.

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Washington Rule of Law Project

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[5] Perhaps this is where the Code Revisor will place Section 5 when SHB 1396 is codified.

CERTIFICATION OF SERVICE

I hereby certify that on the 19th day of August, 2007, I caused a true and correct copy of the foregoing to be served upon the following individuals by the method(s) indicated.

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August 19, 2007

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